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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

76-635

UNITED STATES STEEL CORPORATION, ET AL., ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

MULTISTATE TAX COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM UNDER RULE 16

WILLIAM D. DEXTER,
Bank of Olympia Building
Olympia, Washington 98501
(212) 867-0606

SAMUEL N. GREENSPOON,
600 - 3rd Avenue
New York, New York 10016
(206) 943-8320

Attorneys for Appellees.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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WILLIAM D. DEXTER,
Bank of Olympia Building
Olympia, Washington 98501
(212) 867-9606

SAMUEL N. GREENSPOON,
600 - 3rd Avenue
New York, New York 10016
(206) 943-8320

Attorneys for Appellees.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Appellees respectfully move that this Court affirm the judgment of the three-judge District Court below on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as to not need further argument; or, in the alternative, to dismiss

the appeal herein for lack of a substantial federal question.

STATEMENT OF APPELLEES' POSITION

The appellant attack the Multistate Tax compact on the ground it requires congressional consent for its validity. The lower court, on authority of this court's recent decision in *New Hampshire* v. *Maine*, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), held that the Multistate Tax Compact does not require congressional consent for its validity. It based its holding on findings, specifically supported by the undisputed record in this cause, that the Compact does not shift any political power among the states or encroach upon federal supremacy.

The Appellants sought to raise other issues in the lower court pertaining to the impact of the Compact on interstate commerce and their rights under the Fourteenth Amendment (due process and equal protection) and Fourth Amendment (unreasonable searches and seizures). These issues were also properly disposed of by the court below. Appellants' position on these issues are spurious and totally without merit. Appellants have abandoned them except for the unsupported factual claim that the Compact unreasonably burdens interstate commerce. Clearly, then, as the Appellees assert, there is no question raised in this appeal requiring any further consideration by this court. The well-reasoned opinion of the three-judge court below (Jur. St., App. A, pp. 1a-21a) correctly and adequately disposes of all the issues in this cause.

STATEMENT OF THE CASE

Appellant's Statement of the Case is incomplete, misleading and contains numerous statements of fact and opinion not supported by the record.

This action involves the validity of the Multistate Tax Compact (hereinafter referred to as the "Compact") on its face. In their Amended Complaint (included herein as Appendix A), the Appellants asserted that the Compact violated certain provisions of the United States Constitution and sought declaratory and injunctive relief against its enforcement. The Appellees, asserting that only questions of law were involved, moved for a summary judgment and requested that the motion be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284.

As required by local court rule 9(g), in support of Appellees' motion for summary judgment, Appellees filed a "Statement Under Rule 9(g)" supported by the Affidavit of Eugene Corrigan, Executive Director of the Multistate Tax Commission (the governing body created under the Compact and hereinafter referred to as the "Commission") and documents of unquestioned authenticity. The Appellees' Statement Under Rule 9(g) is appended hereto as Appendix B. There is no dispute as to any material fact in this cause including the facts in the 9(g) statement and Corrigan affidavit as well as the documents.

The provisions of the Compact (Jur. St., App. E, pp. 54a-79a) are analyzed in the Rule 9(g) Statement and in the lower court opinion (Jur. St., App. A, pp. 4a-9a). As indicated in the 9(g) Statement, the Commission is the administrative agency for the Compact created by Article VI of the Compact. (App. B, p. 25a). In reference to the powers and duties of the Commission under the Compact, the following statements are significant:

1. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the appellants or any other person whatsoever. (App. B, p. 25a; Jur. St., App. A, p. 11a).

2. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (App. B, p. 26a; Jur. St., App. A, p. 11a).

3. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax;

(ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (App. B, p. 28a; Jur. St., App. A, pp. 11a-12a).

4. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (App. B, p. 28a; Jur. St., App. A, p. 11a).

It is further significant that Congress, other than by enactment of minimal jurisdictional standards under Public Law 86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to

the plaintiffs or corporations similarly situated. (App. B, p. 28-29; Jur. St., App. A, pp. 12a-13a).

After analyzing the constitutional issues in light of the undisputed facts raised herein by the Appellants, the three-judge court below held:

> "* * * we find the Compact to be lawful, and the Compact's creation, the Commission, to be a lawfully constituted body." (Jur. St., App. A, p. 20a)

The court based its holding upon the following undisputed findings:

1. The Compact does not tend to increase the political power of the member states or encroach upon or interfere with federal supremacy and therefore does not violate the Compact Clause. (Jur. St., App. A, pp. 11a, 12a)

2. The Compact does not unreasonably burden or discriminate against interstate commerce. (Jur. St., App. A, pp. 14a, 20a)

3. The Compact does not deny Appellants equal protection or due process of law. (Jur. St., App A, p. 20a)

4. The Compact does not subject Appellants to unreasonable searches and seizures. (Jur. St., App. A, p. 20a)

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED AND THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.

The opinion of the three-judge court below clearly demonstrates that the constitutional issues raised by appellants in this cause have been conclusively adjudicated against appellants' position by previous decisions of this court. Therefore, this court should either affirm the opinion of the lower court, or dismiss the appeal for lack of a substantial federal question.

A. This court's recent decision in New Hampshire v. Maine, supra, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), and other cases applying the test laid down in Virginia v. Tennessee, 148 U.S. 503 (1893), conclusively establish that the Multistate Tax Compact in question does not require congressional consent under Article I, § 10, clause 3 of the United States Constitution because it does not increase the political power of the States or interfere with the just supremacy of the United States.

The Appellants mistakenly assert that the Multistate Tax Compact is invalid for lack of congressional consent under by Article I, § 10, clause 3 of the United States Constitution, which reads in material part:

> "No State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *"

The applicable test in determining whether a compact or agreement among the states requires congressional consent was set forth by this court in the

early case of *Virginia* v. *Tennessee*, 148 U.S. 503 (1893), *supra*:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." (148 U.S. 419)

This test was reaffirmed as the controlling test in *New Hampshire* v. *Main*, *supra*, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), and has been quoted with approval in *Wharton* v. *Wise*, 153 U.S. 153 (1894); *Sterns* v. *Minnesota ex rel. Marr*, 179 U.S. 223 (1900); and *Louisiana* v. *Texas*, 176 U.S. 1 (1900).

In applying this test, interstate agreements in aid of state taxation have been held valid without congressional consent.[1] In fact, the Multistate Tax Compact itself has been held valid by three other

[1] *Dixie Wholesale Grocery Company* v. *Martin*, 278 Ky. 105, 129 S.W. 2d 181 (1939) (Upheld agreement between Kentucky and Ohio for exchange of information re interstate shipment of cigarettes by holding that compact consent requirement "only applies to political alliances which may encroach upon the supremacy of the United States." (278 Ky. 711, 129 S.W. 2d 184)); *Robert Tobacco Co.* v. *Department of Revenue*, 322 Mich. 519, 34 N.W. 2d 54 (1949) (Upheld agreement similar to that involved in *Dixie Wholesale Grocery*, *supra*, on authority of that case and *Virginia* v. *Tennessee*); *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521 (1952) (Upheld reciprocity motor vehicle licensing legislation on authority of *Dixie Wholesale Grocery*, *supra*, and *Virginia* v. *Tennessee*, *supra*); *Bode* v. *Barrett*, 344 U.S. 583 (1953) (The Supreme Court in affirming the Illinois Supreme Court noted that the kind of reciprocal arrangements involved therein "has never been thought to violate the Compact Clause of Art. I, § 10 of the Constitution.")

courts in addition to the court below against claims that it required congressional consent.

In *Kinnear, et al.* v. *The Hertz Corporation*, 86 Wn. 2d 407, 545 P.2d 1186 (1976), the Supreme Court of Washington unanimously upheld the Compact against the same constitutional arguments raised here by the Appellants by an analysis of the constitutional questions comparable to that employed by the three-judge court below. Cf. *Multistate Tax Commission, et al.*, Petitioners v. *Sperry Rand Corporation*, Respondent, United States District Court for the District of Idaho, No. 1-76-168 (by order dated October 26, 1976, the District Judge upheld the joint audit provisions of the Multistate Tax Compact here in question by granting Petitioners' motion for summary judgment; and *Dorgan*, Petitioner v. *International Business Machines Corp.*, Respondent, and *Dorgan*, Petitioner, U.S. District Court for the District of North Dakota, Southwestern Division, Nos. A1-74-24 and A1-74-25, respectively (by order dated October 7, 1976, the District Court held that the Respondents were required to make their books and records available for audit by auditors of the Multistate Tax Commission).

Other types of interstate agreements not directly relating to the power of taxation have also been ruled valid under the *Virginia* v. *Tennessee* test without congressional consent.[2]

[2] *Fisher* v. *Steele*, 39 La. Ann. 447, 1 So. 882 (1887); *Dover* v. *Portsmouth Bridge*, 17 N.H. 200 (1845); *Union Branch R.R. Co.* v.

To our knowledge, there has never been any case which has attempted to limit or criticize the rule of *Virginia* v. *Tennessee*.[3] It has even been cited in debates in Congress over congressional consent as expressing the settled rule of law. See, e.g., Debate on Congressional Consent to the Southern Regional Educational Compact, 94 Cong. Record, Senate, pp. 5561, 5485.

In light of the above cases and in particular this court's recent decision in *New Hampshire* v. *Maine*, *supra*, 48 L. Ed. 2d 701, S. Ct. 2113, the only question in regard to the consent issue is whether or not the Compact tends to increase the political power of the member states in a manner which may encroach upon the just supremacy of the United States. The Compact in question clearly does not do so.

As the lower court held, the Compact confers only advisory and recommendatory powers on the

E.T. & Ga. R.R. Co., 14 Ga. 327 (1853); *Ham* v. *Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943); *State* v. *Doe*, 149 Conn. 216, 178 A.2d 27 (1962); *Landes* v. *Landes*, 1 N.Y.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14, appeal dismissed 352 U.S. 948 (1956).

In *Union Branch R.R. Co.*, *supra*, which was decided prior to *Virginia* v. *Tennessee*, *supra*, the court noted:

> "(1) In our opinion, this prohibition (The Compact Clause) applies only to such an 'agreement or compact' as is in its nature political; or * * * conflicts with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government." (14 Ga. 339) (Material in parenthesis added)

[3]In speaking of the rule of *Virginia* v. *Tennessee*, Engdahl, in an article on Compacts in the Michigan Law Review, noted that the rule "* * * has long been acquiesced in by the Supreme Court and by every inferior court which has considered the problem, as well as virtually every modern commentator." (64 Mich. L. Rev. 74)

Commission (the administrative agency created by the Compact to administer its provisions). The Compact leaves completely intact the individual member states' power over its sole subject matter, that of state and local taxes of multistate businesses. As found by the court below: "The member states have ceded no sovereignty over tax matters to the Commission." (Jur. St., App. A, p. 14a)

The Compact does not interfere with any congressional power, including the power to regulate interstate commerce. An examination of the Compact (Jur. St., App. E, pp. 54a-79a) makes it clear that it is not the type of agreement or compact which requires congressional consent for its validity.[4]

[4]The purposes of the Compact are stated in its text: to facilitate the proper determination of state and local tax liability of multistate taxpayers, to promote uniformity of state tax systems, to facilitate convenience in taxpayer compliance, and to avoid duplicative taxation. (Jur. St., App. A, p. 5a) To carry out these purposes the multistate taxpayers are given an option to elect to apportion and allocate their income under the Uniform Division of Income for Tax Purposes Act. (Articles III and IV; Jur. St., App. A, p. 5a) Smaller multistate taxpayers are given an option to simplify their tax reporting by electing to pay on their receipts from sales in lieu of the tax on their income. (Article III-2; Jur. St., App. A, pp. 5a-6a) To avoid double sales or use tax, credits for taxes paid in other states are granted; and the member states have agreed to honor sales and use tax resale or exemption certificates furnished the vendor by his customer. (Article V; Jur. St., App. A, p. 6a)

The Commission is authorized to adopt uniform regulations for the taxes dealt with by the Compact, but these are merely advisory and are not binding on any state. (Article VII; Jur. St., App. A, p. 11a) There is also a provision for setting up machinery for arbitrating controversies between multistate taxpayers and the states under the Uniform Division of Income for Tax Purposes Act provisions or comparable provisions. (Article IX; Jur. St., App. A, p. 8a) This article is not presently in force.

Finally, there is Article VIII, which provides for the multistate audits under attack in this case. There is not the slightest warrant for

Under the Compact, the member states administer their own tax laws and do not delegate any of their ultimate authority to anyone. The Compact does not encroach upon the federal domain or shift power among the states. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit agreements with other states. By adoption of the Compact, each state, in enacting certain substantive tax law in concert with other states, has retained complete and absolute control over its own tax system. Furthermore, each state has the inherent power to delegate audit responsibilities to a third party. (Jur. St., App. A, pp. 11a-12a)

The attempt by the legislatures of twenty-one states to improve tax administration by creating the Commission as a purely advisory and recommendatory agency could not possibly alter the political balance among the states or between the states and the federal government.[5]

contending that the multistate audits "tend to increase the political power in the states" in a manner that encroaches upon or interferes with "the federal supremacy." (Jur. St., App. A, pp. 11a-12a) Surely, the way in which states administer their taxes, whether by use of their own auditors or Commission auditors, is within their domain.

[5]The Compact promotes policies that are in the interest of the federal government and have been pursued by that government itself.

The federal government has a profound interest in improving administration of state taxes. This has been made painfully clear by the intense pressures on the national government to come to the

We submit that the Compact and the implementation of its joint audit provisions are fully within the power and domain of the states. These provisions in no way shift political power among the states or encroach upon or interfere with the federal supremacy. Consequently, congressional consent is not required for their implementation. The federal government and the individual states retain the same power and the same supremacy with the Compact in force as they have without the Compact.

In sum, based upon the provisions of the Com-

rescue of state and local governments because of their inability to meet burgeoning budgets for education, health, welfare, crime, drug addiction, and the like, the latest manifestation of which is the enactment by Congress of the revenue sharing program. Moreover, collaboration between state-federal-local governments as a means of improving tax administration, is a policy that has long been pursued and encouraged by the national government. For example, the Advisory Commission on Intergovernmental Relations was established by Congress in 1959 *inter alia* to: "Recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers." (PL 380, 86th Congress, 1st session).

The federal interest in improving state tax administration is evidenced by the tax information exchange agreements now in force between the Internal Revenue Service and the states. (See P-H Federal Taxes, § 35, 443, 15 (1972). For a description of the background and development of this program see "Intergovernmental Cooperation in Tax Administration," Advisory Commission on Intergovernmental Relations (June, 1961, A-7).)

The collaborative audit technique employed by the Commission in making multistate audits is likewise employed by the federal and state governments under the agreements. And the purposes, as stated in the Standard Federal-State Tax Agreement, are essentially the same as those of the multistate audits here at issue, namely, to achieve "minimum duplicate audit effort, increase federal and state audit coverage, minimum taxpayer contact and optimum revenue results." See IRS-State Model Agreement on Coordination of Tax Administration, P-H Federal Taxes, § 55, 295 (4) (1970).

pact and their operative effect and based upon the uniform decisions of this court including *Virginia* v. *Tennessee*, *supra*, and *New Hampshire* v. *Maine*, *supra*, it is clear that there is posed no federal question in reference to the "congressional consent" issue which requires further consideration by this court.

B. **This appeal presents no substantial federal question under the commerce, equal protection and due process clauses of the United States Constitution because the Compact does not unreasonably burden interstate commerce or unconstitutionally discriminate against multi-state taxpayers.**

In addition to the "congressional consent" question, Appellants below attempted to pose questions under the commerce, equal protection and due process clauses of the United States Constitution by arguing that the Compact unduly burdens or discriminates against multistate taxpayers as compared to intrastate taxpayers. In their Jurisdictional Statement, Appellants argue only that the Compact unreasonably burdens interstate commerce (Jur. St., pp. 25-26) and that the advisory role of the Commission somehow may result in denying them Fourteenth Amendment rights (Jur. St., p. 27). The interstate commerce and Fourteenth Amendment (equal protection and due process) arguments of Appellants have been adequately dealt with in the opinion below. (Jur. St., App. A, pp. 13a-20a) We believe that this opinion is so persuasive as to require little, if any, further argument.

Assuming arguendo, that there are differences in the standards applicable to multistate taxpayers under the Compact and applicable to intrastate taxpayers under member state laws, various principles of constitutional law prevent Appellants from successfully relying on those differences to invalidate the Compact.[6]

Appellants must establish that the alleged differences are significant and result in an actual or threatened injury which denies them constitutional rights. *Re 620 Church Street Building Corp.*, 299 U.S. 24, 27 (1936); *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 544, 545 (1914). *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 338 (1944). A distinction in form is not sufficient. *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1931).

This court has upheld a variety of differences between state taxes as they pertain to multistate business as compared to intrastate businesses against the argument that these differences deny multistate taxpayers constitutionally protected rights. Appellees are aware of no decision of this court that has even hinted that administrative differences in determining the tax liability of multistate businesses, as compared to intrastate businesses, violate any federal constitutional rights of multistate businesses.

In *Henneford* v. *Silas-Mason Co.*, 300 U.S. 577

[6]The lower court specifically held: "The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer." (Jur. St., App. A, p. 20a)

(1937), and in *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1940) this court noted that the methods used to collect taxes imposed upon multistate businesses there involved were different from those used to collect taxes imposed upon intrastate businesses. These differences were deemed immaterial by the court.[7] There is thus nothing in the commerce clause discrimination cases that would lend support to the argument that the differences between the Compact standards in relation to multistate taxpayers and member state standards in relation to intrastate taxpayers are significant under the commerce clause.

In order for Appellants to establish that the compact denies them equal protection or due process of the law, they must establish that multistate taxpayers cannot be classified differently from intrastate taxpayers. However, such classification is permissible unless it is arbitrary and capricious; and unless no imagined set of facts would justify the classification. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Madden* v. *Kentucky*, 309 U.S. 83 (1939); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959).

[7] In fact, this court has upheld tax statutes as nondiscriminatory as to interstate businesses so long as comparable taxes are imposed somewhere along the tax chain on intrastate businesses. *Hinson* v. *Lott*, 75 U.S. 148 (1869); *Gregg Dyeing Co.* v. *Query*, *supra*; *Henneford* v. *Silas-Mason Co.*, *supra*; *Alaska* v. *Artic Maid*, 366 U.S. 199 (1961); *General American Tank Car Corp.* v. *Day*, 270 U.S. 199 (1961); *Cashey Baking Co.* v. *Virginia*, 313 U.S. 117 (1941); *Nelson* v. *Sears Roebuck & Co.*, *supra*. In fact, the identical tax burden is not required to be placed on interstate businesses as compared to intrastate businesses. *General American Tank Car Corp.* v. *Day*, *supra*; *Alaska* v. *Artic Maid*, *supra*.

Multistate businesses, by the very nature of their activities within a particular state, must of necessity be treated differently than purely local businesses. This court can take judicial notice of the fact that the problems involved in auditing a multistate-multinational corporation with national and international operations are vastly different from those involved in auditing the local grocery store. This alone disposes of the argument that the compact denies Appellants equal protection or due process of law. The differences applicable to intrastate taxpayers as compared to interstate taxpayers are based on a reasonable classification. The reason is that they rest on "some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins* v. *Riley*, 268 U.S. 137, 142 (1925))

The important consideration here is that under the compact multistate taxpayers and intrastate taxpayers retain the same substantive rights concerning state and local taxation. *Metropolitan Co.* v. *Brownell*, 294 U.S. 580 (1935); *American Motors Insurance Co.* v. *Starnes*, ... U.S. ....., 96 S. Ct. 1800 (May 19, 1976). There is no claim here that they have not. Thus, there is no merit to the Appellants' equal protection and due process arguments.

In sum, as found by the three-judge court below, the Appellants' commerce clause, due process clause and equal protection clause arguments are totally lacking in merit and raise no substantial federal

question which requires further consideration by this court.

C. Appellants' argument that the questions at issue are substantial ignores the import of this court's recent decision in New Hampshire v. Maine, supra, and the import of the well-reasoned three-judge opinion below and is replete with misstatements of fact and irrelevant, erroneous contentions and argument; and demonstrates a lack of a substantial federal question in this cause.

Appellants argue that there are three substantial federal questions presented, namely, whether the Compact requires the consent of Congress for its validity (Jur. St., pp. 10-24); whether it unconstitutionally burdens interstate commerce (Jur. St., pp. 25-26); and whether it denies multistate taxpayers equal protection and due process of law (Jur. St., p. 27). In arguing the "congressional consent" question, Appellants depict the Compact Commission as a powerful organization that is transforming the interstate taxation system without regard to the substantive tax laws of the member states. This argument is replete with misstatements of fact which ignore the absence of any power in the Commission to fix or determine any tax liability or issue any rules, regulations, determinations or recommendations that are in any way binding on any taxpayer or any state. However, in arguing that the Compact unreasonably burdens interstate commerce and violates equal protection and due process of law restrictions, the Appellants argue that the lack of power in the Commission and its purely advisory role results in the violation of these constitutional provisions.[8]

Inconsistency is not the only defect in Appellants' argument. The main defect in Appellants' argument is that it is not based upon any facts in the record in this cause and has nothing to do with the question of whether the Compact is invalid on its face. In commenting on the type of factual material set forth in Appellants' Jurisdictional Statement, the three-judge court below noted:

> "No contention is made that the Compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.
>
> "Certain of the issues of fact which plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, plaintiffs have not 'set forth specific facts showing there is a genuine issue for trial.' Rule 56(e), F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest to

[8]This inconsistency in the Appellants' argument was noted by the three-judge court below in responding to the Appellants' commerce clause argument:

> "Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states." (Jur. St., App. A, p. 14a)

> the various states in determining whether to join or continue membership in the Compact." (Jur. St., App. A, p. 3a)

In arguing that there are substantial federal questions to be resolved by this appeal, the Appellants completely ignore the opinion of the court below and make no reference to any specific provisions of the Compact or any fact in the record in this cause. If the court below had been wrong in any respect, we can be sure the Appellants would have highlighted such error. Furthermore, if any provision of the Compact or any fact in the record in this cause would support the Appellants' argument, we are equally sure the Appellants would have called it to the attention of this court. In short, the Appellants have sought to reach beyond the provisions of the Compact, the record in this cause and the opinion of the court below and have engaged in an effort to create a substantial federal question where none exists.

Appellants set forth unsupported, erroneous and inconsistent statements pertaining to substantive tax matters and to the work of the Commission in their Jurisdictional Statement and attempt to conclude therefrom that the Compact is invalid under the United States Constitution. While it would unduly lengthen this motion to address all of the statements which are in error, we will address some of the more egregious of Appellants' misstatements.

In arguing that the Compact requires congressional consent, the Appellants do not face the fact

that this court in *New Hampshire* v. *Maine, supra,* specifically affirmed as a rule of law the dictum in *Virginia* v. *Tennessee, supra*:

> "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *Virginia* v. *Tennessee*, 148 U.S. 503, 519, 37 L. Ed. 537, 13 S. Ct. 728 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.' Id., at 520, 37 L. Ed. 537, 13 S. Ct. 728. *See Wharton* v. *Wise*, 153 U.S. 155, 168-171, 38 L. Ed. 669, 14 S. Ct. 783 (1894)." (48 L. Ed. 2d 707)

Thus, contrary to Appellants' argument, the *Virginia* v. *Tennessee* test, *supra*, as affirmed by this court in *Wharton* v. *Wise*, 153 U.S. 155 (1894), is settled law.

In sum and substance, the Appellants, in regard to the "congressional consent" issue, have sought to weave a fiction of an omnipotent commission created under the Compact. Contrary to the Appellants' statement on page 10 and throughout their Jurisdictional Statement, the Compact does not create an

independent and regional administrative body.[9] The Commission has no independent power or authority. As has always been the case, the power remains in each state in accordance with its laws, procedures and administrative practices.

Appellants admit on page 15 of their Jurisdictional Statement that the member states individually have the power to do much of what is accomplished by the Compact and Commission and also that the Commission acts in a purely advisory capacity. It is thus clear, notwithstanding the Appellants' argument, that *New Hampshire* v. *Maine*, *supra*, decides the "congressional consent" issue.

Nevertheless, Appellants argue at some length that the Compact is invalid for the lack of congressional consent. This argument is full of conjecture and speculation. It is based on the erroneous premise that the Commission, as a matter of administrative practice, has adopted invalid rules and regulations and procedures in violation of the Compact and the substantive tax laws of the member states. These are

[9]Appellants argue that these efforts of the Commission are regional efforts primarily of the Western States and that they are strongly opposed by the other states. (Jur. St., pp. 16-17) Such argument overlooks the composition of the member states and the fact that the governors of the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee and West Virginia have authorized their respective states to participate in the deliberations and activities of the Commission as associate members of the Compact. Section 13 of the By Laws of the Commission provides for associate membership and provides that associate members have a right to full participation in the activities and the work of the Commission, except that they have no formal vote. There are thus 34 states in all parts of the Nation which are participating in the activities of the Commission.

serious, totally unwarranted and erroneous conclusions of the Appellants own choosing.

On pages 6 and 16 of the Jurisdictional Statement, the Appellants assert that the Commission is transforming the interstate taxation system by adopting regulations calling for "combined reporting and full apportionment of nonbusiness income." This is in error. The only regulations adopted by the Commission pertain to Article IV of the Compact; that is, the implementation of the Uniform Division of Income for Tax Purposes Act contained therein. Neither Article IV nor the regulations promulgated thereunder have anything to do with combined reporting. Rather, they specifically provide for the allocation of nonbusiness income.

On pages 17-18 of the Jurisdictional Statement, the Appellants assert that:

> "The Multistate Tax Commission has adopted rules and practices which call for the use of 'combined reporting' and the 'unitary business' concept. Under these regulations, a taxpayer and its affiliated corporations (whether or not the latter are subject to the states' tax jurisdiction) are required to file a tax return reporting the entire net income of the whole group."

Again, inasmuch as the Commission has adopted no combined reporting or unitary business regulations, this statement is completely in error.

On page 18 of the Jurisdictional Statement in Footnote 15, the Appellants assert that the unitary

business and combined reporting concepts have been criticized in Congress. Appellants fail to note that the unitary business and combined reporting concepts and full apportionment of all income of affiliated corporations were recommended in the reports referred to in footnote 15 and were incorporated in HR 11798, 89th Cong., 2nd Sess. (1966).[10]

On page 19 of the Jurisdictional Statement, the Appellants state:

> "The Commission has also issued regulations eliminating the distinction between business and nonbusiness income."

On page 20 of the Jurisdictional Statement in footnote 20, Appellants state again that the Commission's regulations require combined reporting and full apportionment of nonbusiness income.[11] Again, these

[10]The report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives in House Report No. 952, 89th Cong., 1st Sess., at page 1154, noted that:

> "Often corporations which are controlled directly or indirectly by the same interests are so mutually dependent on each other for their success that the books of an individual corporation cannot accurately reflect the corporation's contribution to the profitability of the entire multicorporate enterprise."

It then recommended at page 1155 of the same report that:

> "State tax administrators be allowed to require consolidation in any case where two or more corporations are affiliated by common ties of more than 50% of stock ownership and at least one of the affiliates has realty or an employee in the state."

At page 1144 of the report, the subcommittee further recommended:

> "* * * that formula apportionment be used as the sole method of dividing income among the states for tax purposes, without the use of specific allocation or separate accounting."

[11]If the Appellants were correct in their contention, which they weave throughout their argument pertaining to the "congressional consent" question, that the Commission has adopted rules and regulations pertaining to the "combined reporting" and "unitary" con-

statements are simply incorrect. The Commission's regulations do not require combined reporting or full apportionment of nonbusiness income. Section 1 of Article IV of the Compact defines "business" income and "nonbusiness" income. It requires, as does the Commission regulations, that nonbusiness income be subject to specific allocation and that business income be subject to apportionment under the three-factor formula contained in Article IV of the Compact.[12]

cepts, we fail to see how this would raise a substantial federal question. These are concepts approved by the judiciary and indeed found to be necessary to properly apportion the income of multistate-multinational corporations to the respective states. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Retcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271 (1924) and *Butler Bros.* v. *McColgan*, 17 Cal.2d 664, 11 P.2d 334, aff'd 315 U.S. 501 (1941); *Edison California Stores* v. *Colgan*, 30 Cal.2d 472, 183 P.2d 16 (1947); *Superior Oil Company* v. *Franchise Tax Board*, 34 Cal. Rptr. 545, 386 P.2d 33 (1963). For a recent discussion on "combined reporting" see Frank M. Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices" 42 *Journal of Taxation* 106 (Feb. 1975). Cf. "Multinational Corporations and Income Allocation under Section 482 of the Internal Revenue Code, 89 Harvard L. Rev. 1202.

[12]Section 1 of Article IV of the Compact (Jurisdictional Statement, Appendix E, p. 58a) defines nonbusiness income as all income other than business income and defines business income as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." The regulations of the Commission implement this language.

The regulations contain examples of nonbusiness income subject to specific allocation. For example, Reg. IV.1.(c)(4) Example (vi) reads: "The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonbusiness income." (Seventh Annual Report, Multistate Tax Commission (1974), Appendix J)

On page 20 of the Jurisdictional Statement, the Appellants assert:

> "Finally, the Commission does not allocate income under its regulations and practice to a state which does not tax such income. This 'nowhere income,' as it is called by Mr. Corrigan, is instead apportioned so as to be taxed, again increasing the cost of interstate business and negating the decision of a sister state to stimulate its economy through tax incentives."

This is not correct. Under the Commission regulations and Article IV of the Compact, income is assigned to those states which have jurisdiction to tax regardless of whether or not they actually tax that income.

On page 22 of the Jurisdictional Statement, the Appellants state that:

> "The methods of the Commission are contrary to those embodied in bills proposed in Congress after lengthy study of interstate taxation by congressional committees."

This statement is incorrect. Appellants are apparently referring to "combined reporting" and full apportionment of all income. As heretofore indicated, H.R. Rept. No. 952, 89th Cong., 1st Sess., Vol 4 (1965), which contains the recommendations resulting from the extensive study of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives, recommended full apportionment of all

income and recommended "combined" reporting or "consolidated" reporting of the income of the members of an affiliated group.[13] This is the only congressional study that has made any specific recommendations in these areas.

On pages 23 and 24 of the Jurisdictional Statement, the Appellants argue that the Compact and Commission interfere in the conduct of foreign affairs by requiring combined reporting. Inasmuch as neither the Compact nor the Commission requires this, such argument is without any factual foundation.[14]

On pages 25 and 26 of the Jurisdictional Statement, the Appellants attribute all of the difficulties inherent in state taxation of multistate- multinational businesses to the Commission because the Commission lacks the power Appellants would attribute to it in making their compact clause argument. The argument of Appellants on pages 25 and 26 of the Jurisdictional Statement is not supported by any facts. They are appropriately answered by the three-judge court below as follows:

> "The stated purposes of this Compact, *supra*, are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk

[13]See footnote 10, *supra*, and H.R. 11798, 89th Cong., 2nd Sess. (1966) which embodies the Subcommittee's recommendations.

[14]It should be further noted that though the Congress has considered various aspects of the problems associated with state and local taxation of multistate businesses, the Congress has taken no policy position on any of the matters touched upon in the Jurisdictional Statement. To date, Congress has left the states free to deal with these problems. It has taken a "hands off" policy.

of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states. That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is any unconstitutional

burden on interstate commerce." (Jur. St., App. A, pp. 14a-15a)

In the last analysis, what the Appellants object to is the cooperative efforts of the states to identify the problems associated with state income taxation of multistate-multinational businesses and to provide for a common uniform solution of those problems.[15] However, this objection of Appellants does not raise any substantial federal question.

SUMMARY OF APPELLEE'S POSITION

The issue in this cause is not how the Compact is administered by the Commission. Rather, it is whether or not the Compact which creates the Commission and prescribes its responsibilities, authorities, and duties is totally invalid on its face. The Appellants' Jurisdictional Statement is not responsive to this question.

Placing this case in its proper perspective makes it clear that the Compact does not require the consent of Congress because it does not result in any shift of political power among the states or in any manner encroach upon or interfere with the supremacy of the federal government. The long-standing rule of *Virginia* v. *Tennessee*, *supra*, which

[15]The court may well wonder why the Appellants have mounted such a strident attack upon the Compact and the Commission created thereunder. The answer is simply this: Appellants are well aware of the fact that joint audits, conducted in accordance with uniform guidelines consistent with the laws of the member states participating in the joint audits, will reveal much more tax liability to such member states than individual state audits by non-uniform, ill-defined guidelines.

was recently affirmed by this court in *New Hampshire* v. *Maine*, *supra*, irrefutably disposes of this issue.

The commerce clause, due process of law and equal protection of law issues are also summarily disposed of by examination of the provisions of the Compact. There is absolutely nothing in the Compact that supports the contention that it unreasonably burdens interstate commerce or that it denies multistate taxpayers equal protection or due process of law.

It is therefore respectfully submitted that the three-judge court below properly analyze and dispose of all the issues raised in this cause by the Appellants concerning the validity of the Compact.

CONCLUSION

It is respectfully submitted that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument; and that indeed most of the assertions which the Appellants make are completely unsupported by the record. Of the questions which Appellants raise: Question 1 has been conclusively resolved by this court's recent decision in *New Hampshire* v. *Maine*, *supra*; and Questions 2, 3 and 4 raise no real issue at all insofar as the record herein is concerned.

Wherefore, it is respectfully requested that this court either approve the opinion of the court below and affirm that court's judgment, or dismiss this appeal.

DATED this 29th day of November, 1976.

Respectfully submitted,

WILLIAM D. DEXTER
Bank of Olympia Building
Olympia, Washington 98501

SAMUEL N. GREENSPOON
600 - 3rd Avenue
New York, New York 10016

APPENDIX A

AMENDED COMPLAINT

Class Action

Index No. 72/3438

CASE ASSIGNED TO JUDGE TENNEY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES STEEL CORPORATION, *et al*

Plaintiffs,

v.

MULTISTATE TAX COMMISSION, *et al*

Defendants.

Plaintiffs, on behalf of themselves and all persons similarly situated, allege for their complaint as follows:

THE PARTIES

1. Plaintiff, United States Steel Corporation, is a Deleware corporation; plaintiff, Standard Brands Incorporated, is a Delaware corporation; plaintiff, General Mills, Inc., is a Delaware corporation; and plaintiff, The Procter & Gamble Distributing Company, is an Ohio corporation. None of the named plaintiffs has its principal place of business in Colorado or in a state of which any individual Commissioner is a citizen.

2. The Multistate Tax Compact (the "Compact") went into effect in its party states on August 4, 1967, when seven states had adopted it. As of the present time, the following states have adopted the Compact; Alaska, Arkansas, Colorado, Florida,

Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Compact has not been given the consent of Congress as required by Article I, Section 10, clause 3 of the United States Constitution.

3. The Compact provides for the establishment of the Multistate Tax Commission (the "Commission") to administer its provisions. (Article IV) It provides for the conduct of interstate audits of multistate taxpayers upon the request of a party state or the Commission may offer to conduct an audit based on it determination that such audit would be "of interest" to a number of party states; and it purports to provide subpoena powers and authority to seek court orders to the Commission in connection with such audits. (Article VIII) In addition, the Compact provides rules for the division of income (Article IV) which are elective with the taxpayer. (Article III) It also provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Article V) The Compact also provides for the adoption of uniform regulations by the Commission with respect to income tax, capital stock tax, gross receipts tax, or sales or use tax with respect to "any phase of the administration of such law" and the prescription of uniform tax forms. (Article VII).

4. Defendant Multistate Tax Commission has been organized under the provisions of Article VI, Section 1(a) of the Compact. Said Commission has

its headquarters at 1909 - 26th Street, Boulder, Colorado and is a citizen of such state; it also maintains an office at 2 Penn Plaza, New York, New York. Said Commission is, pursuant to Article VI, Section 1(a) of the Compact, composed of one "member" from each party state who is generally the state's chief administrator of the types of taxes to which the Compact applies; each such member is named a defendant herein. Further, pursuant to Article VI, Section 1(f) of the Compact, the Commission has appointed defendant Eugene F. Corrigan, Executive Director. On information and belief, defendant Corrigan is a citizen of the State of Colorado, and each member of the Commission is a citizen of the state of which he is a tax administrator.

JURISDICTIONAL ALLEGATIONS

5. Under color of the Compact and of the laws of various of the party states, defendant Commission, its individual members, and its Executive Director, defendant Corrigan, have threatened and continue to threaten action against plaintiffs in violation of the Constitution of the United States and in conflict with the constitutions and laws of the several states. Defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records to persons who may not be properly authorized or qualified under state laws to conduct such audits or to receive such books and records and who may not be subject to the confiden-

tiality requirements imposed upon state auditors and to the punishments and penalties provided for breach of such requirements. The Compact and such demands by defendants pursuant to the provisions thereof are invalid under the Compact Clause, Article I, Section 10, clause 3 of the United States Constitution; encroach upon the power of Congress to regulate commerce among the several states as provided in the Commerce Clause, Article I, Section 8 of the United States Constitution and impose unreasonable burdens on such commerce; violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution; and violate the Fourth Amendment proscription against unreasonable searches and seizures all as more particularly described below.

6. Unless defendant Commission, its members, and defendant Corrigan are restrained by this Court, the constitutional and statutory rights of plaintiffs, United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and all others similarly situated, will be immediately and irreparably harmed.

7. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1332 and 1343.

8. This action arises under the Constitution, laws and treaties of the United States and the matter in controversy herein exceeds the sum or value of $10,000.00 exclusive of interest or costs, insofar as,

for example, the costs of submitting to the unconstitutional audit demands of defendants, both on the part of the individual plaintiffs and the class as a whole, would be more than $10,000.00.

9. Jurisdiction lies as well under 28 U.S.C. §1332 as the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest or costs, as aforesaid, and the controversy is between citizens of different states.

10. Jurisdiction lies as well under 28 U.S.C. §1343(3) without regard to jurisdictional amount to redress the deprivation by defendants, under color of state law, statute, custom or usage, of rights secured to plaintiffs by the Constitution of the United States.

11. Plaintiffs' action for declaratory and injunctive relief is authorized by (a) 28 U.S.C. §§2201 nad 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments; (b) 42 U.S.C. §1983 which authorizes equitable relief for the deprivation under color of law of rights secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States; and (c) 28 U.S.C. §§2281, 2284 providing for injunctive relief against the enforcement, operation or execution of any state statute on the ground of unconstitutionality.

12. This is a proper case for a determination by a three judge court pursuant to 28 U.S.C. §§2281, 2284, since plaintiffs seek an injunction against im-

plementation and enforcement of a compact between the states having applicability in several states, and state-wide applicability within each state so adopting it, on the ground that said compact and the implementing statutes are contrary to the Constitution of the United States.

13. Venue lies in the Southern District of New York by virtue of the residence therein of plaintiffs and of defendant Commission and by virtue of the fact that the claim arises therein as demands for audits have been directed thereto.

14. Service of process upon defendant Corrigan and defendant Commissioners who are not residents of New York is authorized under Federal Rules of Civil Procedure 4(e) and under New York CPLR §§302, 313.

CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(b)(1)(A); 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure.

16. Plaintiffs are members of a class containing, on information and belief, several thousand members consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission. The class is so numerous that joinder of all members is impracticable. Plaintiffs, who have themselves been subjected to demands to submit such audits, can fairly and adequately

protect the class and are aware of no conflicts of interest among the members of the class. The questions of law and fact raised by plaintiffs' claim are common to and typical of the class, and include the following: (1) whether the Compact is invalid under Article I, Section 10, clause 3 of the United States Constitution; (2) whether the Compact violates Article I, Section 8 of the United States Constitution; (3) whether the Compact violates the Fourteenth Amendment to the United States Constitution; and (4) whether the Compact violates the Fourth Amendment to the United States Constitution.

17. The prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants and adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members or might substantially impair or impede their ability to protect their interests.

18. The defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

STATEMENT OF CLAIM

19. The Multistate Tax Compact, in enactment and in operation, is in violation to the Constitution of the United States, the constitution of numerous state, and of controlling state law on numerous grounds, including:

A.

20. The United States Constitution, Article I, Section 10, clause 3 provides:

> "No State shall, without the consent of Congress, • • • enter into any Agreement or Compact with another State, or with a foreign Power. • • • "

21. The Multistate Tax Compact has not been given the consent of Congress and thus is invalid under Article I, Section 10, clause 3 of the United States Constitution.

B.

22. Interstate taxation and the power over interstate commerce are inextricably intertwined. Under Article I, Section 8 of the United States Constitution, Congress has the exclusive authority "to regulate Commerce with foreign Nations, and among the several States. • • • "

23. Interstate taxation should not be the subject of conflicting legislation by the several states.

24. Congressional interest in regulating interstate taxation and in providing uniform standards therefor has been demonstrated by the introduction, consideration and enactment of several bills.

25. The Multistate Tax Compact encroaches upon this area of exclusive federal supremacy and provides not uniform, but disparate, standards in the area of interstate taxation.

26. In addition, the Multistate Tax Compact discriminates against taxpayers engaged in interstate commerce.

27. By reason of the foregoing, the provisions and implementation of the Multistate Tax Compact violate Article I, Section 8 of the United States Constitution.

C.

28. The Multistate Tax Compact fails to provide adequate standards regarding the qualification of Commission auditors, adequate assurance to multistate taxpayers regarding the confidentiality of audit information and adequate remedies to multistate taxpayers with respect to breach of confidentiality of audit information. The Compact purports to give the Commission broad subpoena powers and authority to seek court orders in connection with the performance of interstate audits.

29. Such standards, assurances and remedies are provided to intrastate taxpayers, such broad powers and authority are not available in connection with the performance of intrastate audits, and discrimination against plaintiffs and other members of the class in these respects is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

D.

30. The Multistate Tax Compact requires plaintiffs and other members of this class to produce their books and records for audit to Commission auditors unqualified under applicable state laws and to whom confidentiality requirements are inapplicable and unenforceable. In addition, such auditors are agents

of a body whose existence is in violation of the United States Constitution, as aforesaid.

31. Defendants' demands for audit in such circumstances constitute demands for unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

32. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves, and all others similarly situated, that this Court:

1. Assume jurisdiction, and convene a three-judge court under 28 U.S.C. §§2281, 2284 to determine the merits of this controversy;

2. Determine pursuant to Rule 23(c)(1) of the FRCP that this action may be maintained as a class action;

3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the FRCP declaring that the Multistate Tax Compact is invalid under Article I, Sections 8 and 10 of the United States Constitution, and Amendments Fourth and Fourteenth thereto, under the Constitutions of the several states, and under controlling state law, and declaring that defendant Commission has been established in violation of the United States Constitution; and

4. Enter preliminary and permanent injunctions enjoining the Multistate Tax Commission and the individual defendants, their successors, agents and employees, and all other persons in active concert and participation with them from implementing and

enforcing the provisions of said Multistate Tax Compact, whether through the office of the member states or otherwise, enjoining such Commission from taking any further actions whatsoever, and requiring such Commission to be disbanded.

Dated: New York, New York
January 9, 1973

WHITE & CASE
s/ By Thomas McGanney
A Member of the Firm
Attorneys for Plaintiffs
14 Wall Street
New York, New York 10005
(212) 732-1040

APPENDIX B

72 Civ. 3438 (CLB)

Defendants' Statement Under Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES STEEL CORPORATION, *et al.*,

Plaintiffs,

—against—

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

The following constitutes the material facts as to which the defendants contend there is no genuine issue to be tried.

The Parties

This action was commenced by plaintiffs, United States Steel Corporation, Standard Brands, Incorporated, General Mills, Incorporated, and the Proctor and Gamble Distributing Company, on behalf of themselves and all persons similarly situated (Amended Complaint, p. 1). The following additional corporations are intervenor plaintiffs: Bristol-Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Tel. & Tel. Corp., International Business Machines*, Xerox*, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corportation (Judge Tenney's decision dated February 5, 1974). The plaintiffs are all engaged in business in

*It is our understanding that International Business Machines and Xerox will withdraw as intervenor parties.

more than one state and thus subject to the provisions of the Multistate Tax Compact pertaining to interstate business and to taxes imposed by more than one state. (Corrigan Affidavit p. 2)

The defendants in this cause are the Multistate Tax Commission and its Executive Director, Eugene F. Corrigan, who administer the "Multistate Tax Compact" entered into by 21 states by appropriate state legislation. (Amended Complaint, pp. 1-3) Other named defendants are the tax administrators of the 21 member states which have adopted the Compact.** (Amended Complaint, pp. 1-3) They include the tax administrator for the states of Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. These tax administrators are named as commissioners of the Multistate Tax Commission from their respective states. (Amended Complaint, pp. 1-3)

The Controversy

The specific controversy in this cause is whether or not the defendants can administer the interstate (joint) audit provisions of the Multistate Tax Compact (the "Compact") in accordance with its terms absent congressional consent of Congress under Article I, Section 10, Clause 3, of the United States Constitution and without denying the plaintiffs and members of the class various constitutional rights as

**California will be the 22nd regular member as of January 1, 1976. (Corrigan Affidavit, p. 1)

alleged by plaintiffs in their amended complaint (Amended Complaint, pp. 3-4).

More specifically, as contained in their jurisdictional allegations, the plaintiffs allege that under the color of the Compact and of the laws of various of the party states, Defendant Commission, its individual members, and its Executive Director have threatened and continue to threaten action against plaintiffs in violation of their constitutional rights by the demand of the Defendant Commission, its individual members and Defendant Corrigan to have plaintiffs submit to interstate audits to be conducted by the Commission. They further assert that the Compact and the demands by the defendants to turn their books and records over to the Commission auditors for joint audit purposes pursuant to the provisions of the Compact: (i) are invalid under the compact clause Article I, Section 10, Clause 3, of the United States Constitution; (ii) encroach upon the power of Congress to regulate commerce among the several states as provided in the commerce clause, Article I, Section 8, of the United States Constitution; (iii) impose unreasonable burdens on such commerce; (iv) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and (v) violate the Fourth Amendment proscription against unreasonable searches and seizures (Amended Complaint, pp. 3-4).

In order to determine the validity of these com-

plaints as set forth more fully in the plaintiffs' Amended Complaint, it is necessary to examine the provisions of the Multistate Tax Compact to see what it does and does not do.

The Multistate Tax Compact

(1) The provisions of the Multistate Tax Compact (the "Compact") as enacted by the 21 member states are substantially in the statutory form enacted by the state of Washington which statute is attached to the affidavit of Eugene Corrigan. (Corrigan Affidavit pp. 1, 7-14)

(2) The Compact went into effect in its party states on August 4, 1967, when seven states had adopted it. (Amended Complaint, p. 2)

(3) As of the present time, the states whose tax administrators have been named as defendants and the state of California effective January 1, 1976, have adopted the Compact (Amended Complaint p. 2; affidavit of Eugene Corrigan, p. 1).

(4) The Compact contains twelve Articles (Corrigan affidavit, pp. 7-14).

(5) Article I sets forth the purposes of the Compact. These are to:

1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2) Promote uniformity or compatibility in significant components of tax systems.
3) Facilitate taxpayer convenience in compli-

ance and filing of tax returns and in other phases of tax administration.

4) Avoid duplicative taxation. (Corrigan Affidavit, p. 7)

(6) Article II contains definitions. (Corrigan Affidavit, pp. 6-7)

(7) Article III contains two sections.

a) Section 1 provides in part that:

"Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state * * * may elect to apportion and allocate his income in the manner provided by the laws of such state * * * without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party states * * * or in any one or more of the party states * * * without reference to the election made in others." (Amended Complaint, p. 2; affidavit of Eugene Corrigan, p. 8)

b) Section 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax shall allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability on the basis of a percentage of sales volume within the state.

The Commission has no power to enforce this provision. Section 2 is dependent upon

its operation by the party state legislatures adopting appropriate legislation. (Corrigan Affidavit, p. 8)

(8) Article IV sets forth the optional apportionment and allocation provisions which the interstate taxpayer is given the option to use for both state and political subdivision income tax purposes as permitted by Article III, Section 1. It sets forth the provisions of the Uniform Division of Income Tax Purposes Act promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states. (Corrigan Affidavit, pp. 5, 8-10) This article grants no power to the Commission.

(9) Article V adopts certain substantive provisions relating to sales and use tax laws. It provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Amended Complaint, p. 2)

(10) Article VI pertains to the Multistate Tax Commission. Sections 1, 2, and 4 of this Article involve the creation and internal management of the Commission. These provisions are self explanatory and are attached (as well as the other provisions of the Compact) to the affidavit of Eugene Corrigan (Corrigan affidavit, pp. 10-11). Section 1 provides for membership on the Commission, voting rights,

meetings, personnel, offices, adoption of by-laws, reports, acceptance of gifts and disclosures of the same, etc. (Corrigan affidavit, pp. 10-11) Section 2 provides for the executive committee, advisory and technical committees, and such other committees as the Commission may establish in accordance with the by-laws. (Corrigan affidavit, p. 11) Section 4 deals with the finances of the Commission and provides for a budget of estimated expenditures and the amounts to be appropriated by the member states, a method of apportionment of the budget amounts among the member states, accounting, auditing, etc. (Corrigan affidavit, p. 11)

Section 4 deals with the "powers" of the Commission as follows:

"3. In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact." (Corrigan affidavit, p. 11)

(11) Article VII deals with the subject matter of uniform regulations and forms as follows:

"1. Whenever any two or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of Article IV of this compact.

"2. Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

"3. The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures." (Amended Complaint, pp. 2-3; Corrigan affidavit, pp. 11-12)

(12) Article VIII pertains to interstate audits. (Amended Complaint, p. 2; Corrigan Affidavit, p. 12) It reads:

ARTICLE VIII. INTERSTATE AUDITS

"1. This article shall be in force only in those party states that specifically provide therefor by statute.

"2. Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

"3. The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and

place fixed by the commission within the state of which he is a resident: PROVIDED, That such state has adopted this article.

"4. The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

"5. The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

"6. Information obtained by an audit pur-

suant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

"7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

"8. In no event shall the commission make any charge against a taxpayer for an audit.

"9. As used in this article, 'tax,' in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes."

(13) Article IX is concerned with arbitration of income tax apportionment and allocation disputes between a taxpayer and party states to prevent multiple or double taxation of any taxpayer's income as a result of non-uniform application of the apportionment and allocation rules under Article IV or substantially identical apportionment or allocation rules. This Article is not in effect and can be placed in effect only whenever the Commission finds a need for settling disputes concerning apportionments and allocations and it adopts a regulation putting the

Article into effect. When in effect, it is optional with the taxpayer to submit any dispute to arbitration. (Corrigan affidavit, pp. 5; 12-13)

(14) Article X states the Compact is in force when enacted by seven states and for other states when they enact the same. It specifies how a state may withdraw from the Compact and sets forth the effect of any withdrawal on liability prior to withdrawal and on arbitration proceedings started prior to withdrawal. (Corrigan affidavit, p. 13)

(15) Article XI provides:

"Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of

any court of the United States." (Corrigan affidavit, p. 13)

(16) Article XII concerns construction and severability and reads:

"This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstances shall not be affected thereby. If this Compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. [1967 c 125 § 1.]" (Corrigan affidavit, pp. 13-14)

Implementation of the Compact

1. The Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact). (Corrigan affidavit, p. 1)

2. Attached to the affidavit of Eugene Corrigan

is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states. (Corrigan affidavit, pp. 1, 7-14)

3. Under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies. (Corrigan affidavit, p. 2)

4. The members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net income, gross receipts taxes, capital stock taxes and sales and use taxes. (Corrigan affidavit, p. 2)

5. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever. (Corrigan affidavit, p. 2)

6. The Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact. (Corrigan affidavit, pp. 2, 7 [Definition of Taxpayer])

7. The plaintiffs are multistate corporations

subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations. (Corrigan affidavit, p. 2)

8. All the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission. (Corrigan affidavit, p. 2)

9. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (Corrigan affidavit, p. 3)

10. The Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact. (Corrigan affidavit, p. 3)

11. Although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time

and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not. (Corrigan affidavit, p. 3)

12. The Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court. (Corrigan affidavit, p. 3)

13. Information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions. (Corrigan affidavit, p. 4)

14. The laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books. (Corrigan affidavit, p. 4)

15. The Commission may not make any charge against any taxpayer by reason of any joint audit. (Corrigan affidavit, p. 4)

16. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (Corrigan affidavit, p. 4)

17. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (Corrigan affidavit, pp. 4-5)

18. Congress, other than by the enactment of minimal jurisdictional standards under Public Law

86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the plaintiffs or corporations similarly situated. (Corrigan affidavit, p. 5)

Dated:

Respectfully submitted,

s/ William D. Dexter

WILLIAM D. DEXTER
General Counsel,
Multistate Tax Commission

SAMUEL NOLAND GREENSPOON
EATON, VAN WINKLE & GREENSPOON
600 - 3rd Avenue
New York, NY 10016
Counsel for Defendants.